1978

Edwin Gossner v. Dairymen Associates, Inc. et al : Brief of Respondents

Utah Supreme Court

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BRIEF OF RES

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AUTHORITIES CITED

IN THE SUPREME COURT OF THE

STATE OF UTAH

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EDWIN GOSSNER, Plaintiff, vs. DAIRYMEN ASSOCIATES, INC., a corporation, E. ODELL SUMMERS, ORVAL E. PETERSEN, Defendants and Respondents, and BERKELEY BANK FOR COOPERATIVES, a corporation, Defendant Appellant.	:	Case No. 15679

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BRIEF OF RESPONDENTS

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APPEAL FROM THE JUDGMENT OF THE
FIRST JUDICIAL DISTRICT COURT OF BOX ELDER COUNTY
THE HONORABLE VENOY CHRISTOFFERSEN, DISTRICT JUDGE

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STATEMENT OF THE CASE

This is an interpleader action by Plaintiff, WHEREIN Plaintiff tendered into court the amount of $31,635.29, and wherein the Defendants-Respondents, E. Odell Summers and Orval E. Petersen, and the Defendant-Appellant, Berkeley Bank for Cooperatives claimed an interest in the money tendered.

DISPOSITION IN LOWER COURT

Berkeley Bank's Motions for a Directed Verdict and for Judgment Notwithstanding the Verdict were denied, and the jury entered a verdict in favor of the Defendants-Respondents, E. Odell Summers and Orval E. Petersen, and the court entered a Judgment and Findings of Fact and Conclusions of Law, in accordance therewith.

RELIEF SOUGHT ON APPEAL

Defendants-Respondents, E. Odell Summers and Orval E. Petersen, seek an order sustaining the trial court order in their favor, entitling them to a portion of the monies tendered into court by the Plaintiff amounting to $12,127.67 for E. Odell Summers and $12,467.13 for Orval E. Petersen.

STATEMENT OF FACTS

Defendants-Respondents, E. Odell Summers and Orval E. Petersen, are dairy farmers. Sometime prior to 1975 both men became members of the dairy cooperative, Defendant Dairymen Associates, Inc. (hereinafter Dairymen), executing

uniform marketing agreements with the cooperative. Basically, the agreement provided that Dairymen would market all milk produced by the dairy farmers, and in turn would reimburse the farmers in payment for the amount contributed by the farmers for the cooperative.

Dairymen contracted separately with an independent milk hauler to pick up the milk from Mr. Summers and Mr. Petersen and later deliver it to Dairymen's various customers. (T. 27).

In January, 1975, Dairymen's checks to Mr. Summers and Mr. Petersen failed to clear the bank due to insufficient funds in its account. (T. 72,159). Both Mr. Summers and Mr. Petersen notified Dairymen that the bank had refused payment of its checks. (T. 72,159). After telephone discussions with Dairymen concerning the bad checks, and in view of Dairymen's shaky financial picture, both Mr. Summers and Mr. Petersen told Dairymen that they considered the contract to have been breached and both desired to terminate the contract. (T. 72,74,159).

In March, 1975, Dairymen executed a security agreement with Berkeley Bank for Cooperatives, (hereinafter Berkeley Bank) wherein Dairymen delivered two promissory notes payable to Berkeley Bank in the amounts of $380,000.00 (Ex. 9) and $180,000.00 (Ex. 10).

Dairymen requested that each of its members sign an

"Installment Promissory Note" in the amount of $14,000.00. (T. 28,29). William Henry Finney, at the time general manager of Dairymen, described the notes as basically a commitment on the producer's part to continue shipping milk to Dairymen. (Ex. 52) Both Mr. Summers and Mr. Petersen refused to sign the notes and again expressed their feelings that Dairymen had breached the agreement and their desire to terminate membership in the association. (T. 20,30,52,74).

On April 3, 1975, Dairymen through its attorney, threatened legal action in the event Mr. Summers and Mr. Petersen terminated the agreement. (Ex. 4,26).

On April 9, 1975, Mr. Summers and Mr. Petersen, through their attorney, wrote a letter stating that because of Dairymen's shaky financial situation, mismanagement of affairs, the incurring of heavy debt, and issuance of the checks with insufficient finds, both wished to terminate their association with Dairymen. (Ex. 22).

Dairymen invited Mr. Summers and Mr. Petersen to attend an association meeting on April 26, 1975 to discuss their grievances with the cooperative. (Ex. 13). Dairymen rejected requests that the agreement be terminated on that occasion.

In July, 1975, Mr. Summers and Mr. Petersen instructed Mr. George Thornley, a milk hauler, to stop delivering their milk to Dairymen and begin delivering their milk directly to Gossner Cheese Company. Both farmers also

notified both Dairymen and Edwin O. Gossner of their intentions. (T. 76,164,165).

From July, 1975, to November, 1975, when Dairymen went out of businesss, Mr. Thornley delivered the Respondents' milk directly to Gossner. (T. 23) However apparently because of Gossner's fear that he would incur legal action from Dairymen, he continued to send payment to Dairymen in July and August. No payments were sent in at least October and November of 1975. However, Dairymen continued to claim the milk delivered to Gossner from Mr. Summers and Mr. Petersen on its accounts receivables. It also continued to send checks to the two farmers for the milk.

It did this even though it knew that Respondents were delivering milk directly to Gossner (T. 32) and despite the fact that Mr. Thornley was terminated as a Dairymen hauler on October 1, 1975. (T. 55).

Both Respondents continued to accept the checks because Gossner had not tendered payment to them to that point. However, checks sent in September, October and November of 1975 failed to clear the bank.

In November of 1975, Mr. Summers and Mr. Petersen filed an action against Dairymen and Gossner Cheese Company, claiming amounts owed them of $12,127.67 to Mr. Summers and $12,467.13 to Mr. Petersen. (Ex. 14, 28). Dairymen failed to answer the complaint and a Default Judgment was entered

against it. (Ex. 15,29). Gossner Cheese Company and Edwin O. Gossner were dismissed from the suit with prejudice by Stipulation and Order (EX. 17,20,31) pursuant to an agreement that Gossner tender the money into court by filing an interpleader action. (T. 80,99,194). The dismissal was filed only after the Stipulation and Order were agreed to. (T. 109).

ARGUMENT

POINT I

THE TRIAL COURT WAS CORRECT IN DENYING APPELLANT'S MOTIONS FOR A DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE FOR A NEW TRIAL.

At the close of the evidence Appellant's counsel moved the Court for a directed verdict in its favor on the basis that the Respondents failed to meet their respective burdens of proof and upon the fact that issues raised at this trial were res judicata. The Court denied the motion. (T.210). The Court thereafter entered Findings of Fact and Conclusions of Law and Judgment on November 28, 1977. The Appellant filed its Motions for Judgment Notwithstanding the Verdict and for a New Trial on December 7, 1977. (R. 239). The Court denied these motions and entered a Memorandum Decision on January 17, 1978, (R. 267) and an Order Denying Appellants' Motions on January 27, 1978. (R. 268). The trial court was correct in denying these motions for the following reasons:

POINT IA

THE MONEY TENDERED INTO COURT BY THE PLAINTIFF WAS OWED TO MR. SUMMERS AND MR. PETERSEN FOR MILK DELIVERED DIRECTLY TO PLAINTIFF BY VIRTUE OF THE TERMINATION OF THE UNIFORM MARKETING AGREEMENT BETWEEN RESPONDENTS AND DEFENDANT DAIRYMEN ASSOCIATES, INC..

Neither Mr. Summers or Mr. Petersen dispute that Berkeley Bank has a security interest in the accounts

receivables of Dairymen. However, the money owed for milk delivered to Gossner during the months in question is not rightfully an account receivable on Dairymen's books. That milk was sent directly from Mr. Summers and Mr. Petersen to Gossner by an independent hauler, Mr. Thornley, whose employment with Diarymen had been terminated on October 1, 1975. (T. 55). The milk was delivered with notice to all parties that neither Mr. Summers or Mr. Petersen were operating under the terminated agreement with Dairymen. (T. 76,164,165).

That both farmers continued to receive and accept checks from Dairymen after the contract was terminated does not necessarily waive the termination.

In Pedrini v. Mid-City Trailer Depot, Inc. 459 P2d 76 (Wash. 1969), the court stated:

> "Diligence in recission is a relative question, and whether or not there has been an unreasonable delay in a given case depends upon the particular circumstances of the case." 459 P2d at 78.

Likewise, in Eggen v. M & K Trailers and Mobile Home Brokers, Inc., 482 P2d 435 (Colo. 1971), the court, in holding that four to five months was not an unreasonable delay for a buyer to effect a recission of a sales contract, explained:

> ". . . a delay on the part of the buyer will be excused in excercising his right to rescind, if it is due to the promises of the seller that the defect will be remedied, or to his requests that further trial be made, or to other acts or declarations of the seller tending to induce delay." 482 P2d at 438.

In Eggen, the seller repeatedly told the buyers that the defects discovered by the buyers on a newly purchased mobile home would be fixed. Such assurances stalled the buyers from fully rescinding the agreement. Finally, when after more than four months of assurances without action, the buyers terminated the contract.

In the case before this court, Dairymen continually resisted efforts by the Respondents to terminate the agreement after its original breach by threatening law suits. Dairymen also wrongfully continued to bill Gossner for milk delivered by Mr. Thornley, even after the latter's termination of employment as a hauler for Dairymen on October 1, 1975.

These actions deterred Gossner from paying Mr. Summers and Mr. Petersen for the milk he received from them. It certainly prevented Respondents from rejecting checks sent by Dairymen representing payment for the milk for fear that if they failed to accept the checks, they might not receive any payment for the milk at all.

It is crystal clear that from the first time that Dairymen's check was returned for lack of sufficient funds that Respondents considered that action a breach of the agreement and they in turn expressed an intention to terminate. Evidences of this intention were manifested in continued oral expressions, refusal to sign the "Installment Promissory Notes," in a written letter through their

attorney dated April 9, 1975, (Ex. 22), and finally their action to quit delivering milk to Dairymen in July of 1975. (T. 76).

The letter of April 9th, expressed concern over Dairymen's mismanagement of monies, its newly acquired debt and the desire to terminate the membership of both Mr. Summers and Mr. Petersen based on these observations and Dairymen's earlier breach.

Yet, Dairymen at no time offered any assurances that it was indeed financially sound enough to continue meeting its obligations under the contract and in fact by September of 1975 it could not longer meet its obligations and by the beginning of 1976 had been declared bankrupt.

If there was any delay on the part of Respondents to make an effective termination of the contract, there is overwhelming evidence that the delay was caused by Dairymen's threat of legal action and wrongful billing.

It is most clear that Respondents at all times intended for the contract to be terminated. It was only a matter of how to effect such a termination without becoming financially disabled.

The agreement having been terminated, Dairymen had no legal right to place the amount of milk delivered from the Respondents to Gossner as owing to it on its accounts receivable list. Yet they did so, billing Gossner accordingly.

At the same time, they attempted to pay Respondents for the milk that the Respondents themselves had delivered to Gossner. The checks sent for this purpose failed to clear the bank during the months of September, October and November of 1975.

This money should not have been paid by Dairymen. It was rightfully owed by Gossner to be paid directly to Respondents.

POINT IB

THE DEFAULT JUDGMENT ENTERED AGAINST DAIRYMEN ASSOCIATES, INC., IN WEBER COUNTY DOES NOT HAVE RES JUDICATA OR COLLATERAL ESTOPPEL EFFECT ON THE ISSUES AND PARTIES IN THIS ACTION.

As stated in Appellants brief, the elements of res judicata as enunciated by the Utah Supreme Court in East Millcreek Water Co. v. Salt Lake City, 159 P2d 863 (Utah, 1949), are as follows:

(1) it must be between the same parties or privies;
(2) it applies only where the claim, demand, or cause of action is the same in both cases; and
(3) the matter goes to final judgment, in other words, a judgment on the merits.

See also Wheadon v. Pearson, 376 P2d 946 (Utah 1962).

The general rule, as set forth in Appellant's brief, is that a Default Judgment is a final judgment on the merits for the purposes of both res judicata and collateral estoppel. Blache v. Blache, 160 P2d 136 (Calif. 1945); Technical Air Products, Inc. vs. Sheridan-Gray, Inc., 445 P2d 426

(Ariz. 1968); Tarnoff v. Jones, 497 P2d 60 (Ariz. 1972); Kernan v. Kernan, 369 P2d 451 (Nev. 1962).

However, there is an exception to the general rule that a default judgment is a final judgment for res judicata and collateral estoppel purposes. That exception comes into play when there is more than one Defendant or one Plaintiff in the action and a default judgment is entered against one of the parties.

In Tarnoff v. Jones, supra, a default judgment was entered against one of the Defendants, but no default was obtained against the other Defendant. In holding that res judicata was not proper in this instance, the court stated:

> "Since this judgment did not dispose of the claim against Defendant Gaiber . . . the judgment was not final and hence not appealable. The doctrine of res judicata does not apply to an interlocutory judgment." 497 P2d at 62.

In this case, the default judgment was entered against Dairymen in Weber County when Dairymen failed to answer. But that judgment did not have immediate effect upon Respondents' claim against Gossner. Respondents were still free to pursue their claim in that forum against Gossner without incurring the burden of res judicata or collateral estoppel. Indeed Respondents would have been permitted in the normal course of bringing the action to amend their pleadings or parties. They did not choose to do so for good reason.

The record clearly shows and the testimony of the Respondents is to the effect that a stipulation and order were entered into by all parties to dismiss with prejudice the action against Gossner as to all liability to the money involved in his case because Gossner tendered the money into this Court. (Ex. 17, 20) (T. 80, 99, 194).

The effect of this action was beneficial to all parties involved. Gossner saved legal fees; Berkeley Bank was given an opportunity to prove that the money was due as an account receivable on Dairymen's books; and if Respondents prevailed against Gossner they would receive the money immediately without resort to collection procedures to obtain the proceeds from the judgment.

Based on Tarnoff v. Jones, supra, the default judgment against DAirymen had no res judicata or collateral estoppel effect on Respondents action against Gossner in the Weber County suit. As such, authority cited by Appellant on the doctrines of res judicata, collateral estoppel and discharges of judgments in bankruptcy are inapplicable to the peculiar circumstances of this case.

This forum simply represents a more convenient way to determine whether or not the money Gossner owes for milk delivered to his premises should be paid directly to the Respondents. All parties agreed to this. (Ex. 17, 20).

To permit Appellant Berkeley Bank to invoke the doctrines of res judicata and collateral estoppel after having entered into such a stipulation would clearly defraud the concepts of fairness and equity. Because of the peculiar facts present in this case, Appellant should be barred from raising these defenses.

POINT IC

THE RESPONDENTS MET THEIR BURDEN OF PROOF THAT THEY WERE ENTITLED TO A PORTION OF THE MONEY TENDERED INTO COURT BY GOSSNER.

Much testimony was presented during the course of the trial upon which reasonable minds could draw to determine that the Respondents, Mr. Summers and Mr. Petersen, were entitled to a portion of the money tendered into court by Gossner.

Both Respondents testified that they instructed Mr. Thornley and notified Mr. Gossner that milk would be delivered directly to Gossner after July of 1975. (T. 18, 78, 163, 164, 165). Both Respondents testified that they demanded payment from Gossner for the milk they had delivered to him. (T. 78,165). Mr. Summers testified that he figured out the amount due him by Gossner by examining Dairymen's checks during the months of September, October and November of 1975, which were an attempt by Dairymen to pay Mr. Summers for the milk he had delivered to Gossner. (T. 79). These attempted payments are especially

interesting in light of the fact that Mr. Summers had refused and was not delivering milk to or through Dairymen during these three (3) months and had notified it of that fact. (T. 76).

Mr. Petersen had determined the amount Gossner owed him for delivered milk by adding up the pounds of milk which he had record of delivering to Gossner and multiplying the poundage by the price of the milk. (T. 167). This amount he testified corresponded with the amount which Dairymen attempted to pay him. (T. 168).

Gossner's son testified that the amount tendered into court represents the amount of the invoice sent to Gossner by Dairymen. This invoice was consistent with the milk tickets in Gossner's possession. (T. 135). There was testimony presented that milk delivered by Thornley for Respondents was written up on Dairymen tickets even after instructions had been given to the contrary. Gossner's son had no record of exactly who brought what milk in. (T. 136).

Still, the evidence showed that Gossner owed the Respondents money. Dairymen did attempt to pay the Respondents for the same amounts they alleged were owed to them by Gossner. Edwin O. Gossner himself never denied owing money to Respondents. He was never called as a witness in this action to rebut any of the testimony presented.

Based on the foregoing facts and testimony, it is clear that reasonable minds could conclude that the Respondents were entitled to a portion of the money tendered by Gossner into court. This is substantiated by the verdict returned on the trial level by the jury in this case.

POINT II

THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION FOR A NEW TRIAL.

1. The Trial Court did not err in allowing testimony as to issues which were res judicata, and allowing that the pleadings be conformed to the evidence which was presented at the trial.

Based on the arguments set forth in Point IB of Respondents' brief, the Trial Court correctly denied Appellant's motion to invoke res judicata and collateral estoppel.

Utah Rules of Civil Procedure, Rule 15(b), reads in part:

> ". . . If evidence is objected to at trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. . ."

In this case, the court acknowledged that the original

pleadings were different than the basis upon which recovery by the Respondents was sought. However, in reviewing the record of the trial the court concluded:

> "The court further finds that the pleadings may be conformed to what the evidence presented is. Since the theory is not a surprise one but was raised, certain pleadings prior to this time, and that their theory, although not an amended pleading, was advanced in their memorandum, briefs and responses to motion for summary judgment back in December of 1976. So that the theory of the case and the theory on which we've proceeded certainly doesn't come as a surprise, it being now nearly a year later." (T. 155).

Based on Rule 15(b), the courts ruling on allowing the pleadings to be conformed to the evidence is entirely proper. Appellant simply failed to convince the court that it would be prejudiced by the action or that it was a surprise.

2. Respondents concede that the Court erred in allowing hearsay evidence as to what Edwin O. Gossner allegedly said to the Respondents. The evidence was permitted on the assumption that Gossner would be called later as a witness and would have an opportunity to rebut the testimony. He was not called.

But the evidence admitted, did not stand as a naked prosecutor of Respondents' claim. As stated throughout Respondents' brief, there was substantial evidence to support the verdict rendered in this case by the jury.

There is no evidence whatsoever that the jury relied heavily on this evidence to reach its verdict. In view of these facts, this was harmless error.

3. The trial court did not err in giving Instruction Number 7. The question of whether or not the Respondents, prior to September 1, 1975, had terminated any association with Dairymen is totally material to the issues. There was evidence that the contract had been terminated by the Respondents. The fact that the Respondents had terminated their agreement with Dairymen was material to the issue of whether or not they were entitled to receive money directly from Mr. Gossner for milk delivered during the months of September, October, and November 1975.

The court also did not err in failing to give Appellant's proposed instructions concerning the definition of a security agreement. That Instruction Number 7 covers the question of the assignment of accounts receivable.

The Court did give instructions regarding the burden of proof of the parties in Instruction Number 5 and Instruction Number 6.

The Court did adequately instruct the jury.

4. The evidence clearly was sufficient to justify the verdict rendered in this case.

CONCLUSION

Respondents, having met their burden of proving that they were entitled to a portion of the money tendered into this court by Edwin O. Gossner, respectfully request this court to sustain the judgment rendered in Box Elder County and award $12,127.67 to E. Odell Summers and $12,467.13 to Orval E. Petersen.

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CERTIFICATE OF MAILING

I hereby certify that one copy of the foregoing Brief has been mailed to:

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